1986

State of Utah v. Douglas Stewart Carter: Appellant's Second Supplemental Brief

Utah Supreme Court

David L. Wilkinson; Attorney General State of Utah; Sandra L. Sjogren; Assistant Attorney General; Attorneys for Respondent; Lionel H. Frankel, Kevin J. Kurumada; Amicus Curiae.
Thomas H. Means; Attorney for Appellant.

860063

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	)	
Plaintiff/ Respondent,	)	Fourth Judicial District No. 9707 Supreme Court No. 860063
v	)	
DOUGLAS STEWART CARTER	)	Argument Priority Category [redacted]
Defendant/ Appellant.	)	

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

Appeal from a final judgment of Murder in the First Degree
and a Sentence of Death
Fourth Judicial District Court
Utah County, State of Utah
The Honorable Cullen Y. Christensen, District Judge

THOMAS H. MEANS #2221
81 East Center
P.O. Box 2283
Provo, Utah, 84603
Attorney for Appellant

DAVID L. WILKINSON
Attorney General, State of Utah

SANDRA L. SJOGREN
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah, 84114
Attorneys for Respondent

LIONEL H. FRANKEL
KEVIN J. KURUMADA
Counsel for the American Civil Liberties Union
3981 Mount Olympus Way
Salt Lake City, Utah, 84124
Amicus Curiae

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	)	
Plaintiff/ Respondent,	)	Fourth Judicial District No. 9707 Supreme Court No. 860063
v	)	
DOUGLAS STEWART CARTER	)	Argument Priority Category No. 1
Defendant/ Appellant.	)	

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

Appeal from a final judgment of Murder in the First Degree
and a Sentence of Death
Fourth Judicial District Court
Utah County, State of Utah
The Honorable Cullen Y. Christensen, District Judge

THOMAS H. MEANS #2222
81 East Center
P.O. Box 2283
Provo, Utah, 84603
Attorney for Appellant

DAVID L. WILKINSON
Attorney General, State of Utah

SANDRA L. SJOGREN
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah, 84114
Attorneys for Respondent

LIONEL H. FRANKEL
KEVIN J. KURUMADA
Counsel for the American Civil Liberties Union
3981 Mount Olympus Way
Salt Lake City, Utah, 84124
Amicus Curiae

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS CITED

STATUTES and RULES CITED

CONSTITUTION OF THE UNITED STATES:

Amendment 5.

No person shall be held to answer for a capital or otherwise infamous crime , unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Constitution of the United States (continued):

Amendment 14, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

CONSTITUTION OF UTAH:

Article VIII, Section 4.

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. Except as otherwise provided by this constitution, the Supreme Court by rule may authorize retired justices and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The Supreme Court by rule

Constitution of Utah
Article VIII, Section 4 (continued):

shall govern the practice of law and the conduct and discipline of persons admitted to practice law.

UTAH CODE, 1953, as amended:

Section 76-3-207(2).

(2) In these sentencing proceedings, evidence may be presented as to any matter the court deems relevant to the sentence, including but not limited to nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other fact in aggravation or mitigation of the penalty. Any evidence the court deems to have probative force may be received regardless of its admissibility under the exclusionary rules of evidence. The state's attorney and the defendant shall be permitted to present argument for or against sentence of death. Aggravating circumstances shall include those as outlined in 76-5-202. Mitigating circumstances shall include the following:

(a) - (g) [omitted]

Utah Code, 1953, as amended (continued):

Section 76-5-201.

(1) A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, including an unborn child. There shall be no cause of action for criminal homicide against a mother or a physician for the death of an unborn child caused by an abortion where the abortion was permitted by law and the required consent was lawfully given.

(2) Criminal homicide is murder in the first and second degree, manslaughter, negligent homicide, or automobile homicide.

Section 76-5-202 (1)(q).

(1) Criminal homicide constitutes murder in the first degree if the actor intentionally or knowingly causes the death of another under any of the following circumstances:

(q) The homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death.

Utah Code, 1953, as amended (continued):

Section 78-2-4(1).

(1) The Supreme Court shall adopt rules of procedure and evidence for use of the courts of the state and shall by rule manage the appellate process. The legislature may amend the rules of procedure and evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff/ Respondent, v DOUGLAS STEWART CARTER Defendant/ Appellant.	)))))	Fourth Judicial District No. 9707 Supreme Court No. 860063 Argument Priority Category No. 1

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

STATEMENT

On March 8, 1988, pursuant to the pro-se Motion of Defendant, Defendant's appointed appellate counsel was discharged and this counsel was appointed to brief the Court on the nine issues raised by Defendant in his pro-se Motion for Reversal of Appellant's December 18th, 1985, Conviction and orally argue the same nine issues.

Accordingly, this brief argues those nine issues, albeit in a somewhat rearranged, consolidated, and re-numbered order, omitting certain of Defendant's citations considered by this counsel not to be relevant and with additional points and authorities considered by this counsel to be pertinent to the particular argument. The rearrangement, editing, omissions and

additions of this brief are not meant to denigrate or abandon any of Defendant's pro-se arguments; if it is determined by any Justice that any of the points of this brief differs significantly from the arguments for any of the issues raised by Defendant, himself, deference should be given to Defendant's own arguments, as this counsel considers this appointment to be for the purpose clarifying and providing proper legal support for Defendant's own arguments and not for the purpose of supplanting them.

Neither is it the intent of this brief to contest the arguments previously argued by Defendant's former appointed appellate counsel or by Amicus, except as may be specifically set forth herein.

STATEMENT OF ADDITIONAL ISSUES PRESENTED IN THIS BRIEF

1. Was Defendant prejudiced by duplicitous charges contained in the Information?

2. Should the alleged confession of Defendant have been suppressed for the reason that it was not a verbatim transcription of his own words, but rather was drafted and dictated by an investigating officer.

3. Was Defendant prejudiced by the trial court's allowance of an investigating and testifying officer to assist the prosecution at counsel table throughout the course of the trial?

4. Is Defendant prejudiced from effectively appealing for the reason that no record was made of the peremptory challenges?

5. Should Defendant's conviction be reversed because of certain prosecutorial misconduct?

6. Was Defendant denied effective assistance of counsel for reasons in addition to those raised in the first Supplemental Brief and in the Amicus Curiae Brief and should Defendant's conviction and/or sentence of death be vacated and the matter remanded for new trial and or penalty phase?

7. Does the cumulative effect of the various errors committed by the trial court, omissions of his defense counsel, and prosecutorial misconduct demand that Defendant's conviction and/or sentence of death be vacated and the matter remanded for new trial and/or penalty phase?

FACTS

Defendant was charged by Information dated 12 April, 1985, charging him with a violation of Sections 76-5-201 and 76-5-202, Utah Criminal Code, as amended (R. 26). Defendant made an initial appearance before the Honorable G. Gordon Knudsen, Judge, Eighth

Circuit Court, on the 14th of June, 1985, at which hearing it was noted that Duke McNeil of Chicago had been retained as Defendant's attorney (R. 4 - 5). Preliminary examination was held on 25 June, 1985, with Mr. McNeil appearing for Defendant. The record indicates that on 29 November, 1985, counsel for Defendant filed a Motion to Suppress Statements (R. 41) and a Notice of Insanity Defense or in the Alternative Defense of Diminished Mental Capacity (R. 50) and a Motion for Change of Venue (R. 51). It does not appear from the record that counsel for the Defendant filed other motions or requested discovery from the prosecution.

A hearing to set the trial date was held on the date of the filing of the Notice of Insanity Defense, on 29 November, 1985 (R. 55). Defendant did not appear at such hearing. A further hearing on all pre-trial motions was conducted on 9 December, 1985, Defendant appeared personally at such subsequent hearing where testimony was introduced and argument made regarding the motions for suppression and change of venue (R. 239 - 401). However, only one brief exchange was had between counsel and the court regarding the alienist's reports, and no specific reference was made to the insanity defense (R. 398). Defendant asserts that his counsel did not consult with him or give him prior notice of

the insanity defense notice and that he would not have consented to such defense because he wished to pursue the defense that he was not guilty because he did not do the acts alleged in the Information, not that he did the acts but was insane or of diminished mental capacity. Defendant further asserts that he was not informed of or prepared for the examinations conducted by the two court-appointed alienists at the Utah County Jail. The insanity defense notice was later withdrawn on 11 December, 1985, pursuant to Defendant's motion (R 64 - 65).

Trial of the matter was eventually commenced on 12 December, 1985. The Information was read to the jury verbatim by the trial court (R. 1046). Prior to opening statements, counsel for Defendant moved for exclusion of all witnesses (R. 1035). Despite the court's favorable ruling on such motion and without objection from Defendant's counsel or designation or proffer of proof that he was essential to the presentation of the State's case, Lieutenant George Pierpont of the Provo City Police Department was allowed to remain in the courtroom and assist the prosecutor throughout the trial (R. 1041).

Lieutenant Pierpont was called as the State's fourth witness on the fourth day of trial and testified that on 12 April, 1985,

in the jail located in the Metropolitan Safety Building of Nashville Tennessee, Defendant, who had been arrested the previous day by Nashville police officers, signed a document entitled STATEMENT FORM (R. 219). Lieutenant Pierpont further testified that the document was signed after a brief interview of Defendant conducted by officer Pierpont and another Provo City Police Officer, Sergeant Stan Egan, and that the substance of such document was dictated by him (Pierpont) to a stenographer of the Nashville Metropolitan Police Department after the interview of Defendant and that Defendant reviewed and signed the document in the officer's presence after it had been transcribed by the stenographer (R. 1189 - 1192). In addition to the Motion to Suppress and hearing thereon noted herein-above, objection to introduction of the statement was made at trial by counsel for Defendant (R. 1184 - 1185). Lieutenant Pierpont was later recalled for further examination as the State's final witness (R. 1336). Officer Egan did not testify at trial.

Counsel for Defendant requested and was granted instructions on the lesser included offenses of murder in the second degree (R. 144, 147 - 148) and manslaughter (R. 150 - 151) (also R. 154 and 177). Defendant asserts that he was not consulted prior to his counsel's request for these lesser included instructions and

that had he been consulted he would not have approved such requests, again for the reason that he did and does maintain that he was not guilty because he did not commit the acts alleged in the Information, not because he did the acts but may have been guilty of one of the lesser included offenses. Defendant was found guilty as charged of murder in the first degree (R. 220 - 222).

At the penalty stage of Defendant's trial his counsel presented the reports of the two court-appointed alienists by having the clerk read each into the record (R. 1411 - 1429). No other evidence was offered to establish mitigating factors in support of the argument for a sentence of life imprisonment. The jury rendered a verdict of death (R. 223).

SUMMARY OF THE ARGUMENT

It was error for the trial court to read the Information to the jury as the Information contained duplicate reference to the same offense. Such duplication prejudiced the Defendant.

Defendant is prevented from effectively and completely arguing on appeal as no record was kept of the peremptory challenges exercised by the parties.

The trial court erred in allowing introduction of Defendant's written "confession" as such writing memorialized the statements of the investigating officer and not the statements and words of Defendant, himself. This Court should rule that in capital cases and cases of similar magnitude, purported statements and confessions be verbatim transcriptions of the questioning and responses, or if not verbatim, at least supported by back-up stenographic or electronic recording of the questioning and the declarant's actual statement.

In his closing argument at the guilt stage, the prosecution made repeated improper reference to facts not admitted into evidence, to Defendant's exercise of his right not to testify, and vouched for a State's witnesses. Such misconduct was not properly cured by contemporaneous instruction and allowed the jury to deliberate on issues not properly before it, thus unfairly prejudicing Defendant.

The trial court erred in allowing the chief investigating officer to remain at the State's prosecution table throughout the entire course of the trial to assist the prosecutor as well as testify, although his presence at counsel table was not shown to be necessary to the State's presentation of its case and in fact

was not necessary. In capital cases and cases of like magnitude, this court should rule that such procedure is improper as it tends to suggest that the prestige of the State is behind such witness.

Defendant's counsel's representation was below an objective standard of competence generally, and specifically at the penalty stage. Such demonstrable deficiencies prejudiced the outcome of Defendant's trial and raises a reasonable doubt as to the fairness of the jury's verdicts.

The cumulative effect of the trial court's errors, prosecutorial misconduct, and ineffective assistance of defence counsel resulted in a denial of a fair opportunity for Defendant to present his defenses and raises reasonable doubt that the outcome of the guilt/innocence and/or penalty stage would have been the same absent such errors and omissions.

This court should review the entire record of the proceedings in this matter in order to determine if the finding of guilt and the death penalty are appropriate, notwithstanding Defense counsel's failure object or take exception to the various claimed errors at the trial level and notwithstanding the failure

of counsel to raise relevant issues either in this brief or others filed on Defendant's behalf.

ARGUMENT

I

NUMEROUS CASES FROM THIS COURT PROVIDE THAT THE ENTIRE RECORD OF CAPITAL CASES SHOULD BE REVIEWED AND ALL ERRORS CONSIDERED - SUA SPONTE IF NECESSARY - IF IT APPEARS THAT THE INTERESTS OF JUSTICE REQUIRE.

This brief will raise and argue several issues of claimed error and prejudice, some of which have not been properly raised at the trial level. Under normal standards of review, Defendant would be prevented from raising such matters anew on appeal. Nevertheless, this Court has, itself, declared that its duty in capital cases extends to consideration of error even if not raised below. See cases cited in point I of Amicus Curiae Brief as well as State v Schoenfeld, 545 P2nd 193; State v Codianna, 573 P2nd 343; State v Shad, 470 P2nd 246.

Further, this Court has ruled that-

> [w]hile we will not ordinarily raise questions of error on our own motion, ...it is well established that in capital cases when the interests of justice so require the entire proceeding should be reviewed to determine whether errors occurred as a consequence of which the accused did not have a fair trial, even though not assigned and argued. State v St. Clair, 282 P2nd 323.

Consequently, this Court should consider issues raised for the first time in this brief or in the briefs previously filed for Defendant. It should also review the entire record for issues that may have not been briefed, as this Court will undoubtedly note from the various briefs that justice requires such a complete review, in light of the many points raised in the various briefs, in light of the substantial doubt as to the legal sufficiency of Defendant's trial counsel and in light of its long standing ruling that-

> [w]e reject the proposition that the death penalty may be imposed when there is substantial doubt whether it should be. State v Wood, 648 P2nd 71.

This position to consider plain error is consistent with the position of other jurisdictions. See U.S. v Guzman, 781 F2nd 428; Phillips v Lane, 787 F2nd 208; Government of the Virgin Islands v Joseph, 765 F2nd 394. In reviewing the briefs (and hopefully, the entire record) this Court will discover several instances of plain error that may or may not have been raised below and that may or may not have been argued here. This Court should, nevertheless, consider any and all errors that cast substantial doubt on the "fairness, integrity or public reputation of [the] judicial proceedings" conducted below,

Guzman, supra, to determine whether the verdicts of guilt and death were properly reached.

II

IN THE STATE'S CITING TWO STATUTES IN THE INFORMATION AND THE COURT'S READING THE INFORMATION TO THE JURY, DEFENDANT WAS PREJUDICED IN THAT THE JURY WAS LEAD TO BELIEVE THAT DEFENDANT WAS CHARGED WITH TWO SEPARATE OFFENSES.

The Information filed in this matter charged Defendant with violations of Sections 76-5-201 and 76-5-202, Utah Criminal Code, as amended (R. 26). The Information was read to the jury, verbatim, by the trial judge, himself, prior to opening argument (R. 1046). The charging and reading of the two separate statutes implies the State's allegation that Defendant had committed two unrelated offenses. This possible implication was compounded by the court's instructions which made no reference to the meaning or import of Section 76-5-201 to the matter at hand.

Instruction No. 6 applies the language of Section 76-5-202 to the alleged facts of the case (R. 141); but no reference was made to the meaning or significance of Section 76-5-201 or why two statutes were cited in the Information, probably because Section 76-5-201 was not necessary to a complete presentation of

the facts or law relevant to the State's charges. The unnecessary charging and reading of the reference to both statutes without an explanatory instruction on why two were cited served no legal purpose but left the jury with the possible impression that another charge lingered against Defendant and created the implication of more criminal activity than the State was entitled to charge. See United States v Marquardt, 786 F2nd 771.

If it were in fact necessary for a complete charging of the alleged offense that both statutes be included in the Information, and if it were in fact necessary for the jury's complete understanding of the charge that the court make reference to both statutes, then it was also necessary that an explanatory instruction be included to inform the jury of both sections' significance to the charge. However, Instruction No. 6 sets forth a complete allegation of the charge and the facts without need to draw on any of the language of Section 76-5-201. Consequently, it appears that Section 76-5-201 was unnecessary to the State's case or the jury's understanding of the charge and that both should not have been cited and read to the jury.

There is a substantial likelihood that the unnecessary reading of the two statutes, when one would have sufficed,

without further explanation or instruction, created more questions than answers in the minds of the jury and prejudiced Defendant by implying another unexplained and unarticulated offense, creating the substantial likelihood that the jury's guilt and sentence verdicts were rendered partially on the jury's belief that Defendant was a "bad person".

III

DEFENDANT IS PREVENTED FROM FULLY PRESENTING ARGUMENTS ON APPEAL FOR THE REASON THAT NO RECORD WAS MADE OF THE PARTIES' EXERCISE OF THEIR PEREMPTORY CHALLENGES.

The parties commenced exercise of their respective peremptory challenges on the morning of 16 December and then halted before finishing their challenges in order to recess to accommodate Defendant's counsel's need to retrieve certain material expected to be flown in from his home office (R. 1026). The court reconvened that afternoon at which time the remainder of the parties' respective peremptory challenges were exercised (R. 1033). The record only briefly indicates the above-noted occurrences without further comment or memorialization.

Defendant asserts that the silence of the record in this regard prevents him from discovering possible error in the exercise of these privileges; this counsel has been unable to

find case law bearing on this issue with which to advise this Court.

IV

THE TRIAL COURT ERRED IN ADMITTING A PURPORTED STATEMENT FROM DEFENDANT AND THIS COURT SHOULD RULE THAT IN CAPITAL CASES AND MATTERS OF SIMILAR MAGNITUDE, TO BE ADMISSIBLE, ALLEGED CONFESSIONS SHOULD BE VERBATIM TRANSCRIPTIONS OF THE DECLARANT'S OWN WORDS, MEMORIALIZED BY A STENOGRAPHICALLY OR ELECTRONICALLY RECORDED RECORD OF THE DECLARANT'S SPOKEN STATEMENT OR BY AN ALTERNATIVE METHOD OF EQUAL RELIABILITY.

A statement (R. 219, State's exhibit no. 26) attributed to Defendant was admitted into evidence on foundation provided by the testimony of Lieutenant George Pierpont of the Provo City Police Department (R. 1193). Objection was taken to the admission of the statement (R. 1184 - 1185 and 1193). The statement was also the subject of a pre-trial Motion to Suppress Statements (R. 41) which was argued (R. 249 - 357) and denied prior to trial by the trial court which found it was voluntarily given by Defendant (R. 357).

The procedure used to take and record the purported statement was explained by Lieutenant Pierpont on direct

examination (R. 1189 - 1193) and again on cross examination (R. 1211 - 1216). The information contained in the writing was dictated to a police secretary by officer Pierpont after he had conducted a brief interview of Defendant in the presence of officers Cunningham of the Nashville Metropolitan Police Department and Egan of the Provo Police Department. The writing was then presented to Defendant for his signature. The writing, therefore, is actually a memorialization of officer Pierpont's statement of the facts he claims were related to him by Defendant; it comprises the words, phrases, and terminology of officer Pierpont, not of Defendant. The State did not urge, and it does not appear that the procedure used to record the purported statement was necessary because of unusual or exigent circumstances; rather the method used was one of convenience and departmental policy.

As noted, defense counsel filed and argued a motion asking for suppression of the statement for the reason that it was not voluntarily given. It is not clear whether counsel also objected to the statement's admission for the separate reason that the method used to take the statement - in and of itself - was prejudicial, although counsel did argue that it was improper and bore on the issue of voluntariness. Nevertheless, it is urged

here that this Court, pursuant to powers granted by the Constitution of Utah, Article VIII, Section 4, and Section 78-2-4(1), Utah Code, promulgate a rule that in capital cases and matters of similar magnitude, in addition to all other foundational requirements, to be admissible, statements bearing directly on the alleged offense taken by investigating officers, purportedly made by an accused, in a custodial setting, be preserved by stenographic or electronic recordings of the verbatim spoken words of the declarant, or by another method equally reliable in its ability to memorialize the accused's own spoken or written words.

Such methods would more nearly preserve the actual nuances, inflections, emotions, and emphasis of the declarant as well as provide defense counsel, the court, and the jury with a more accurate record of the methods used to extract the statement and protect against undue influence and intimidation. A more accurate record of the entire interrogation process is especially relevant in a situation such as this where Defendant claims the statement was involuntarily induced and where he chooses to exercise his right not to testify and as a consequence the jury is left with only a cold and technical impression of Defendant, personally, and an uncaring and matter-of-fact account of events in the words

of the investigator, emphasizing what the investigator feels is important to the development of the case, and essentially omitting any of the humanity of the accused. Attributing the words of another to the Defendant, himself, undermines his right not to testify.

Neither would the safeguards unduly burden the police responsibilities of the State. Such methods of preservation are readily available in most, if not all, modern police facilities, and if they are not, they would certainly be available from an outside source such as a nearby court, without undue delay or expense. And as this case illustrates, to do otherwise is more often a choice of convenience rather than necessity.

Where the accused´s life is in the balance, where modern methods of preservation are readily available, where the burden to the State is minimal, and where - as in this instance - an accused´s purported statement is undoubtedly the most pivotal and focused-upon item of evidence, it would seem appropriate that the jury be given the best evidence. At both the guilt and penalty stages it is critical that the jury know and judge for themselves whether there was remorse, tears, fears, concern for the victim or family, pressure, intimidation, or promises. And,

of course, more accurate methods of preserving a statement would better enable the court to make assessments of the voluntariness of the statement and the completeness of the explanation and understanding of rights.

It is recognized that such protections may not be appropriate or necessary in every police interrogation, but in capital cases where the consequences are severe and mitigating circumstances are critical to the jury's determination of the penalty, the court and jury as well as the Defendant are entitled to the best evidence that is reasonably available. This can be assured by such extraordinary procedures.

Whereas this Defendant was denied the best evidence of his purported statement, whereas such denial was unfairly capitalized upon in the prosecution's closing argument (as is argued hereinbelow), and whereas no immediate cautionary instructions to disregard such improper capitalization were given by the court, this Court should reverse Defendant's conviction, remand for new trial and rule the purported statement of Defendant inadmissable.

V

IMPROPER STATEMENTS MADE BY THE PROSECUTION IN CLOSING ARGUMENT UNDULY PREJUDICED DEFENDANT AND RAISE REASONABLE DOUBT AS TO WHETHER THE JURY CONFINED ITS DELIBERATION TO LEGALLY ADMITTED EVIDENCE.

This Court has ruled that-

> [i]n reviewing a claim of prosecutorial misconduct, we must determine if the prosecutor's remarks calls to the attention of the jurors matters they would not be justified in considering in reaching the verdict and, if so, whether there is a reasonable likelihood that the misconduct so prejudiced the jury that there would have been a more favorable result absent the misconduct. State v Speer, 750 P2nd 186, citing State v Tillman, 750 P2nd 546; Also see State v Fisher, 680 P2nd 35.

Defendant asserts that several improper prosecutorial arguments were left uncured by the court with the result that the jury was allowed to consider facts not properly before them and/or which unfairly prejudiced their deliberations in favor of the State. The improper statements were of three types: misstatements of facts, comments on the Defendant's exercise of his right to remain silent, and vouching for a State's witness.

Misstatements of facts.

As has been argued, Defendant challenged introduction of his purported statement at the pre-trial and trial stages and this

brief has urged that this Court adopt a rule that would provide for a more fair and accurate record of the circumstances and substance of any purported statements from an accused in a capital case. Interestingly, the need for a better record of the taking and exact nature of the statement is best illustrated by the prosecution's adroit, yet improper, references to the statement in closing argument. Counsel pointed out that "[t]he defendant in his own statement, in his own confession, tells you that 'After I stabbed her eight times in the back she was still moaning and gasping.'" (R. 1344 - 1345). Later, the prosecutor argued, "We know that because Ms. Oleson, according to his [Defendant's] own mouth, dropped the knife in the kitchen after he ordered her to do so....." (R. 1349). Again, he argued "The man who can commit those acts, can write them down for you in a confession ... deserves to be found guilty...." (R. 1354). Finally, in rebuttal, the prosecutor noted "[t]here is only one person in this room who was an eye-witness to the murder of Eva Oleson...[h]e has provided for you by his own mouth each and every element of the crimes that are set forth in first degree murder." (R. 1387).

But, exhibit No. 26 was not the Defendant's "own statement;" it was not "according to [Defendant's] own mouth;"

Defendant did not "write them down;" the words were not "provided ... by [Defendant's] own mouth." The statement was officer Pierpont's; it was according to officer Pierpont's own mouth; and the stenographer wrote them down as they were provided by officer Pierpont's own mouth. It was improper for the prosecutor to argue that the words of the statement were Defendant's when they weren't; it was wrong to imply Defendant chose and mouthed the actual word when he didn't, when the evidence that the words of the writing were exclusively officer Pierpont's was uncontroverted.

While at first glance, it might appear harmless to attribute the words of the statement directly to Defendant, it must be remembered that Defendant argued he had signed the document only after improper inducement and that the substance of the statement was untrue; whether the statement was voluntarily signed and whether the statement was true were still contested issues. To state that the words of the statement were Defendant's own was to connote that those issues had been decided against Defendant. It was, however, the jury's prerogative to decide those issues.

Further, with all due respect to officer Pierpont, the statement is comprised of classic police-report phraseology and reads like a technical document. In a case where the jury is to eventually determine, based on a consideration of the aggravating and mitigating factors, whether the Defendant should be sentenced to death, to attribute the dispassionate and remote tone of the writing directly to Defendant is to subtly imply the existence of an aggravating factor that is not factually founded in the writing.

If it is civilly wrong to make unfair use of another's words then it is certainly improper in this capital case to inaccurately attribute the words of an investigating officer to the Defendant. Such improper references suggested to the jury that Defendant approved of the words and truthfulness of the statement and additionally that Defendant, himself, mouthed the words in the cold, hard fashion they appear in the writing. "[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones." Berger v U.S., 295 US 78; U.S. v Valdes-Guerra, 758 F2nd 1411. The misstatements of fact prejudiced the jury at both the guilt and penalty stages and require reversal of Defendant's conviction.

Comments on failure to testify.

In his final words of rebuttal, the prosecutor argued to the jury-

> I heard no evidence, evidence, [sic] from the witness stand about coercion or about inducing somebody to say anything about something that didn't happen. I heard no evidence that supports any other theory in this case than the theory that was presented by the State of Utah, that he is guilty of first degree murder. (R. 1386).

The Supreme Court of the United States has ruled that the Fifth Amendment of the United States Constitution by way of the Fourteenth Amendment forbids the prosecution's commenting on a defendant's choice to exercise his right not to testify, Griffin v California, 380 US 609; and that although such a comment can be considered harmless error, the burden is on the prosecution to establish beyond a reasonable doubt that the comment was not prejudicial to the defendant, Chapman v California, 386 US 18. Other federal decisions have ruled that references to the exercise of the right to remain silent do not have to be explicit but must be judged by what the jury probably thought, U.S. v Handman, 447 F2nd 853.

Some jurisdictions have expanded the federal protection that forbids comment on a defendant's exercise of the right by ruling

that any comment is prejudicial per-se, requiring automatic reversal. See U.S.v Flannery, 451 F2nd 880 (1st Cir.); State v Smith, 420 P2nd 278 (Az.); Flaherty v State, 183 So2nd 607 (Fla.); State v Wright, 205 So2nd 324 (La.); Sanders v State, 392 SW2nd 916 (Tenn.); People v Alexander, 169 NW2nd 652 (Mich.); State v Chunn, 657 SW2nd 292 (Mo.). While others subscribe to the federal rule that the court must place the burden on the prosecution beyond a reasonable doubt. See State v Davis, 212 A2nd 19 (N.J.); Commonwealth v Reichard, 233 A2nd 603 (Pa.); State v Martin, 498 P2nd 1370 (N.M.); State v Gladue, 677 P2nd 1228 (Mont.). Several states consider the right to remain silent so fundamental that a violation of the right will be reviewed on appeal even absent a proper objection at trial. See State v Smith, supra (Az.); State v Chasse, 230 A2nd 51 (Conn.); Singleton v State, 183 So2nd 245 (Fla).

This Court has ruled that any reasonable doubt as to prejudice that may have occurred by reason of a comment on the failure of the defendant to testify must be resolved in favor of the defendant, State v Eaton, 569 P2nd 1114. Counsel´s comment can fairly be interpreted as being in reference to the Defendant´s choice not to testify and gives rise to reasonable doubt that the jury was thereby prejudiced.

Although the prosecutor did not specifically refer to Defendant in his comments, it is clear that only one person could have provided the evidence that was pointed out as missing. Since Defendant was alone during the entire interrogation process in Nashville he was the only possible witness who was in a position to give evidence "about coercion or about inducing somebody to say anything about something that didn't happen." Similarly, since the main issue at the trial was not that a murder didn't occur or that there were jurisdictional or limitation restrictions, etc, but simply whether or not Defendant was the offender, counsel's comment that he had "heard no other theory in this case than the theory that was presented by the State of Utah," can also be fairly interpreted as a reference to Defendant's failure to take the stand to deny the accusations or to offer his alibi. These comments go beyond a statement on the paucity of the defence, generally, and can only logically be considered as veiled comments on the failure of the Defendant, himself, to testify.

When viewed in light of the lack of any objection and the lack of a contemporaneous admonition by the court to disregard the comments, there is reasonable doubt that some or most or all of the members of the jury understood that they were obliged not

to draw any adverse conclusion from Defendant's decision not to testify. Since Defendant has established prime facia evidence of an improper comment on his choice not to testify, this Court should consider the argument that this fundamental right was violated by the comments, notwithstanding defense counsel's failure to object and should resolve the reasonable doubt that Defendant was thereby prejudiced in favor of Defendant.

Vouching.

The prosecutor further commented regarding a State's witness that "[y]ou know, Lucia Tovar to me was one of the most impressive witnesses in this particular case. She told you in all honesty everything that she saw." (R. 1353). It is generally held that it is improper for a prosecutor to express a personal belief in the credibility of a witness People v Smith, 685 P2nd 786; U.S. v Dennis, 786 F2nd 1029; or to otherwise vouch for a witness and place the integrity and prestige of the government behind the witness State v Sargent, 698 P2nd 598; State v Salcido, 681 P2nd 925.

Admittedly, this reference is isolated and was not repeated or unduly emphasized by the prosecutor. Nevertheless, it was clearly an improper statement of his personal belief in the

credibility of Mrs. Tovar. And, when coupled with the previously noted instances of improper comments on the part of the prosecutor, which were also unchallenged and unadmonished, one is left with reasonable doubt that the jury was without prejudice against Defendant and that the outcome of their deliberations would not have produced a result more favorable to Defendant, but for such improper comments.

VI

THE TRIAL COURT ERRED IN ALLOWING THE STATE'S CHIEF INVESTIGATIVE OFFICER TO REMAIN AT COUNSEL TABLE THROUGHOUT THE TRIAL AND TO TESTIFY FOR THE PROSECUTION.

Lieutenant George Pierpont of the Provo City Police Department led the investigation of the crime charged in this case. After Defendant's arrest in Nashville, Tennessee, he, along with Provo City Sergeant Stan Egan, flew to Nashville, where they interviewed Defendant (1190). Thereafter, Lieutenant Pierpont dictated Defendant's purported statement to a Nashville police secretary for typing.

At trial, defense counsel requested and was granted exclusion of witnesses, pursuant to Rule 615 of Utah Rules of Evidence (R. 1035). However, without any showing of need,

Lieutenant Pierpont was allowed to remain at the prosecution table as part of a 3-man prosecution team including the chief prosecutor and his assistant, Beverly Ramsey (R. 1041). Officer Pierpont eventually testified, first as the State's fourth witness (R. 1180) and later was recalled as the State's final witness (R. 1336).

It is recognized that the purpose of the exclusionary rule is generally considered to be to insure independence of recollection and that investigative officers have been considered to be "an officer or employee of a party which is not a natural person designated as its representative by its attorney" thus fitting into the exception set forth in Rule 615(2), U.S. v Maestas, 523 F2nd 316; U.S. v Pellegrino, 470 F2nd 1205; State v McGrath, 749 P2nd 631. It is also recognized that officer Pierpont's testimony probably was not susceptible to influence from other witnesses in as much as it was confined to facts concerning the taking of the purported statement from Defendant and to the search for the suspected murder weapon, neither of which was the subject of any other witnesses' testimony.

However, this Court is urged to consider the prejudicial effect of the officer's continued presence at counsel table for

another reason. As was noted hereinabove in argument No. V, the State is not permitted to place the prestige and integrity of the government behind its witness, State v Sargent, supra; State v Salcido, supra. Obviously, this occurs when the prosecutor directly vouches for a witness as was done in the instance of Mrs. Tovar. But, it also occurred more subtly with regard to Officer Pierpont. In twice rising from counsel table to take the stand, he testified as one of the prosecution team - almost as if the prosecutor, himself, were giving testimony.

This may be a necessary, proper, and acceptable procedure in the day-to-day prosecutions that regularly take place in every Circuit and District Court. It would not be reasonable to prevent the arresting officer in the vast majority of cases from assisting counsel at the table, especially where counsel may have the responsibility for the prosecution of several cases, may have had limited opportunity to familiarize himself with the case, and would be unreasonably hampered without the assistance of the officer.

But here, where the case involves a capital offense, where trial was held some seven months after the preliminary examination, where the lead prosecutor had the assistance of co-

counsel, where other officers were also available to testify as to the substance of officer Pierpont's testimony (Officers Cunningham and Egan) or alternatively to take Officer Pierpont's place at counsel table, and where the credibility of Officer Pierpont was critical to the issue of the reliability of the purported confession, the lack of any real need for the officer's assistance at counsel table did not justify the resulting likelihood that the jury would be unnecessarily influenced by his continued presence alongside the State's attorneys.

In trials of capital cases the court should be dogged in its protection of the accused's rights to a fair and impartial jury in order to assure "that the death penalty may not be imposed where there is substantial doubt whether it should be." State v Wood, supra. There is substantial doubt that Defendant's trial was fundamentally fair and that the jury maintained its impartiality where the State's principal witness who was twice called to the witness stand, was for five days of trial allowed to sit side by side with the State's counsel especially where reasonable alternatives were available to the State.

VII

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR REASONS IN ADDITION TO THOSE ARGUED IN THE FIRST SUPPLEMENTAL BRIEF AND IN THE AMICUS CURIAE BRIEF.

This Court has ruled that to sustain a claim of ineffective assistance of counsel, a defendant must establish 1)a demonstrably deficient performance outside the wide range of professionally acceptable representation, and 2)the reasonable probability that a different result would have obtained absent such deficient assistance, State v Frame, 723 P2nd 401; State v Archuleta, 747 P2nd 1019. This Court has further held that trial tactics such as choice of witnesses or choice of lines of questioning are matters usually entrusted to an attorney's best judgment and as such are not "outside the wide range of professionally competent assistance." State v Speer, supra citing State v Frame, supra.

Amicus curiae has previously argued that defense counsel was demonstrably ineffective in his apparent failure to adequately acquaint himself with the facts relevant to the case and with certain local law, as can be demonstrated, inter alia, by his failure to request instructions for, examine the expert witness about, or argue the application of the language of

Section 76-5-202(q) which statutorily qualifies the terms "especially heinous, atrocious, cruel, or exceptionally depraved manner," which omissions had an adverse impact on both the guilt and penalty phases. (As noted by amicus, the interchange between the court and counsel that appears on pages 1300 through 1304 of the record is particularly indicative of defense counsel's failure to acquaint himself with documents filed some eight months prior to trial, specifically, and of his over-all failure to prepare, generally.) This brief supports totally the arguments of amicus curiae as regards this issue and wishes to emphasize that the inadequacies noted in that brief are not matters involving tactical decisions but products of an obviously apparent failure to prepare.

In the Supplemental Brief submitted by appointed counsel it is argued that trial counsel's representation was below acceptable objective standards of professional competence in that defense counsel failed to fully and adequately pursue the insanity defense. It should be noted that the Supplemental Brief also points to failure to prepare as the root of the ineffective assistance as regards the insanity motion. That brief correctly argued that "[a] defense attorney should not be allowed to automatically hide his failure to investigate, advise and prepare

a viable defense by simply raising the shield of trial tactic or strategy."

It should also be noted that although the Supplemental Brief argues that the insanity defense should have been pursued more fully, in contrast, Defendant wishes to emphasize that he did not authorize either the insanity defense or the request for the lesser included instructions. He asserts that he had instructed his counsel to argue to the jury that he was not guilty because he did not do the act, not because he was insane or because he did the act but was guilty of some lesser offense. He feels the twp alternative arguments undermined the primary argument that should have been emphasized, solely.

> ...an attorney acts as an assistant for his client and not as a master. An attorney who refuses to present such a basic claim as that of innocence acts outside the duties of an attorney, even if the claim detracts from other defenses presented by counsel. State v Wood, supra.

This brief supports the assessments of both the Amicus Curiae Brief and the Supplemental Brief that the record shows evidence that defense counsel was demonstrably unprepared for a trial of the significance of this case. Further, there appears to be a real probability of a more favorable result had trial counsel been more adequately prepared.

While trial counsel's unpreparedness affected every stage of the proceedings, it was especially damaging to the defense at the penalty stage. The only evidence presented at the penalty stage on behalf of Defendant was the written reports of the two alienists appointed by the court to evaluate Defendant pursuant the Notice of Insanity Defense. One alienist had interviewed Defendant on one occasion; the other visited with Defendant twice. The reports were read into the record by the clerk of the court (R. 1411 - 1429) who apparently stumbled on several of the words in the reports. It does not appear the alienists, themselves, were requested or subpoenaed to appear although each was available: they were introduced to the prospective jurors on the first day of trial by the prosecutor as possible prosecution witnesses (R. 458) and they were later identified as possible prosecution witnesses after defense counsel asked for invocation of the exclusionary rule (R. 1036).

This procedure used to present defense evidence at the penalty stage employed the court's clerk as the mouthpiece and consisted of written reports from two alienists who had twice before been presented to the jury as witnesses for the prosecution. The alienists, themselves, were not present to be examined or to explain or more fully develop their findings and

conclusions or to accentuate the evidence within the reports that might have benefitted Defendant or to counter the obvious impression that the reports were written by witnesses aligned with the State. No family members appeared, to make a showing of support, although Defendant's mother, brother, ex-wife, and young son were available and presumably willing to appear. No friends, former employers, or others having significant association with Defendant appeared. In fact no witnesses were called on Defendant's behalf. The record leaves this counsel (and arguably the jury) with the false impression that no person was willing to appear and stand beside Defendant and that it was therefore necessary to use State employees and witnesses to try to put on evidence of mitigating factors. No evidence of possible influence of alcohol was introduced despite testimony at the trial stage that indicated that possibility (R. 1175). With reasonably competent preparation each of these problems could have been avoided.

In addition to the fact that trial counsel failed to fully investigate and prepare minimally sufficient and reasonably available evidence of mitigating factors at the penalty phase, counsel further failed to protect and preserve certain of Defendant's constitutionally protected rights in introducing the

evidence that was used. The alienists' reports were as damaging for what they did contain as for what they didn't. Because counsel failed to inform or prepare Defendant for the alienists' interviews, Defendant made statements - and counsel later introduced those statements - that might have been protected by the Fifth Amendment right against self-incrimination. The reports detail prior heroin and LSD use, prior commission of felonies, imprisonment, a broken marriage, a period spent as a fugitive, *his response that "don't remember nothing about it" when asked* about the alleged crime, and one alienist's assessment that "[a]lthough he did not specifically deny having committed the crime throughout the examination, he persistently denies any recollection of the crime for which he is charged." The use of the reports also allowed for violations of Defendant's 6th Amendment rights to confrontation - both in that heresay from the alienists, themselves was introduced and because damaging heresay within heresay was included in the alienists' reporting of their interviews with third parties, i.e. a jailer's impression that Defendant was "cocky, arrogant, and manipulative."

Although Section 76-3-207(2) allows for introduction of any relevant evidence at the penalty stage "regardless of its admissability under the exclusionary rules of evidence," this

statute does not obviate Defendant's constitutional rights and it seems unusual that defense counsel would allow introduction of the reports when much of their contents served to accentuate aggravating rather than mitigating factors. Note that the prosecutor was quick to seize upon the reports in his closing argument to point out the aggravating factors that appear in them (R. 1433-1434). The only reason to which this counsel can point to explain defense counsel's use of the reports and his failure to introduce any other evidence is his failure to prepare. While it may be argued that this procedure was an acceptable trial tactic within the wide range of competent professional assistance, it appears probable to this counsel and consistent with the other evidence of unpreparedness that the reports were relied on exclusively at the penalty stage principally because trial counsel had not marshalled or prepared other available and potentially more effective evidence. One wonders what might have been presented as evidence of mitigating factors had there been no reports from the alienists.

In reviewing the trial transcript it is apparent that defense counsel had significant trial skills but that he was demonstrably unprepared on the facts and law. It appears his primary trial "tactic" was to rely on those trial skills at the

expense of proper preparation. That tactic prejudiced defendant's rights to a fair trial and to competent legal representation. This Court should find trial counsel's "tactic" not to be within professionally acceptable limits and that such ineffective assistance probably prevented a more favorable outcome at the penalty stage.

VIII

THE CUMULATIVE EFFECT OF THE ERRORS OF THE TRIAL COURT, THE MISCONDUCT OF THE PROSECUTOR, AND THE INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL DENIED DEFENDANT A FAIR OPPORTUNITY TO PRESENT HIS DEFENCE.

> ... the Defendant is ... entitled to have [the errors] considered cumulatively and as a part of the over-all picture in determining whether he had a fair opportunity to present his defense. State v St.Clair, supra; also see Gooden v Oklahoma, 617 P2nd 248.

As has been noted, the trial court committed several errors, each of which, standing on its own, substantially affected Defendant's ability to present a viable defense; the prosecutor made several improper comments in closing argument, each of which raise reasonable doubt as to whether the jury was able to maintain its neutrality and impartiality; and, probably most critical, the record indicates that defense counsel failed

to adequately prepare for trial and was therefore unable to protect Defendant's substantial rights at several junctures of the trial.

A listing of those errors and omissions includes: the trial court's denial of the motion for change of venue, its admission of prejudicial and inflammatory photographs, its admission of Defendant's purported statement where substantial evidence existed indicating that it was not voluntarily given and where it was not in the words of Defendant, its instruction allowing the jury to consider any evidence presented at the guilt stage in its deliberation in the penalty stage, its failure to instruct the jury at both the guilt and penalty stage regarding the limiting language of Section 76-5-202(q), its failure to exclude officer Pierpont from the proceedings, and its failure to give contemporaneous admonishments to the jury to disregard the prosecutor's various improper comments during closing argument; the prosecutor's improper comments during closing argument including misleading references as to the meaning of aggravating circumstances, a comment on Defendant's failure to testify, vouching for a State's witness, and several misstatement of facts; defense counsel's failure to discover, failure to avail himself of the prosecutor's "open file" policy, failure to

educate himself as to local law, failure to adequately support the motions for change of venue and the defense of insanity, and failure to adequately present minimal evidence of mitigating factors at the penalty stage.

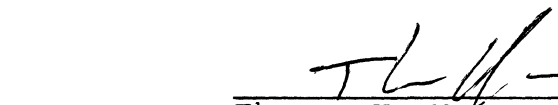
In addition to the individual effect of each of the various errors and omissions, their cumulative effect prejudiced Defendant's right to a fundamentally fair trial by an impartial jury.

CONCLUSIONS

Defendant's conviction should be vacated and the matter remanded for new trial for the reasons that the various errors of the trial court, improper comments of the prosecutor, and most notably, the failure of defense counsel to prepare an adequate defense or object to the court's errors or the prosecutor's misconduct undermine a reasonable confidence in the fundamental fairness of the trail at both the guilt/innocence and sentence stages.

Dated this 6th day of May, 1988.

Respectfully submitted by:



Thomas H. Means
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that on the 9 day of May, 1988, he/she hand-delivered the required number of true and correct copies of the foregoing document to the following in the manner prescribed by law, a copy of the substance of these arguments having been previously hand-delivered to Sandra L. Sjogren on 6 May, 1988:

SUPREME COURT OF UTAH
332 State Capitol Building
Salt Lake City, Utah, 84114

SANDRA L. SJOGREN
236 State Capitol Building
Salt Lake City, Utah, 84114

LIONEL L. FRANKEL
KEVIN J. KURUMADA
3981 Mt. Olympus Way
Salt Lake City, Utah, 84124

ALDRICH, NELSON, WEIGHT, & ESPLIN
43 East 200 North
Provo, Utah, 84601

DOUGLAS STEWART CARTER
Utah State Prison
Draper, Utah, 84020